Choy Yuk Kong & Ors v Landyork Farming Sdn Bhd & Ors (claiming on behalf of themselves and as representatives for the interests of Sykt Landyork Farming Sdn Bhd)

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO JA-24NCC-12–07 OF 2018
EVROL MARIETTE PETERS JC
15 SEPTEMBER 2019

Companies and Corporations — Oppression — Minority shareholders — Plaintiffs commenced action against defendants alleging oppression of minority — Whether plaintiffs established oppression, disregard or unfair discrimination — Whether acts complained of were prejudicial to plaintiffs — Companies Act 2016 s 346

This application concerned an allegation of minority oppression as documented in the originating summons filed by the plaintiffs under s 346 of the Companies Act 2016 ('the Act'). The plaintiffs were the minority shareholders of the first defendant company and the first plaintiff was also a director of the first defendant company. The second and third defendants were the shareholders of the first defendant company, whilst the fourth to eighth defendants were directors of the first defendant company. The sixth and eighth defendants were also the directors and shareholders of the second defendant company, whilst the ninth defendant was the company secretary of both the first defendant and second defendant companies. The oppressive acts were: (a) failure/refusal of the defendants to issue share certificates to the first and second plaintiffs despite having injected a sum of RM352,484 into the first defendant company; (b) abuse of power in bad faith in diluting the shares of the first and second plaintiffs, by allotting 600,000 shares to the second defendant; (c) denial of the right of access to the books of accounts, audited accounts and all documents of the first defendant company, wherein the plaintiffs claimed amounted to oppressive conduct; (d) unjustified payment for oil palm plantation where the plaintiffs claimed that a substantial amount of money was spent in cultivating oil palm on a piece of land ('Lot 6988') owned by Pertanian Daya Teguh Sdn Bhd ('PDT'), which was a subsidiary of the first defendant company; (e) unjustified and illegal transactions with U-Fresh Sdn Bhd ('U-Fresh'), a company related to the sixth and eighth defendants wherein the plaintiffs claimed that U-Fresh owed the first defendant company a substantial amount of money; (f) failure to redeem a piece of land ('Lot 703') which the first and second plaintiffs claimed belonged to them, but was charged to the bank for the benefit of the first defendant company; and (g) failure of the defendants to pay the first and second plaintiffs the sum of RM750,000, being

an advance payment for the consideration of shares in PDT, which they claimed was still owing to them by the first defendant company.

Held, dismissing the application with costs of RM12,000:

(1) The first plaintiff himself had declined to subscribe to the shares of the first defendant company, and had even agreed for the sum to be treated as a loan by him as director, to be repaid by instalments, free of interest, unsecured, and with no fixed repayment term. Under such circumstances, it was inequitable and misplaced for the plaintiffs to now claim minority oppression for a loan that was personal from the first and second plaintiffs to the first defendant company, and for which the first and second plaintiffs had agreed to be repaid via instalments and interest-free (see paras 31–32).

(2) The first plaintiff was informed that the percentage of his shareholding in the first defendant company would be diluted. He even acknowledged it, but refused to subscribe for new shares. In light of such documentary evidence, it was inequitable and spurious for the plaintiffs to now claim that the reduction of their shares was done in bad faith (see paras 34 & 36).

(3) The plaintiffs' claim that a substantial amount of money was spent on cultivating oil palm on Lot 6988 which was owned by PDT, a subsidiary of the first defendant company was a decision taken by the first defendant company as part and parcel of its internal management and therefore, there was nothing oppressive about it. Secondly, the first plaintiff was aware of the oil palm cultivation on Lot 6988. The plaintiff, having full knowledge and involvement in the plantation was prevented from now claiming that the conduct of the first defendant company was oppressive. Thirdly, even if the plaintiffs' claim amounted to mismanagement of the first defendant company, it did not meet the threshold of 'oppression' required by s 346 of the Act as they had not demonstrated the grievance done to them as minority shareholders (see paras 37–38, 40 & 42–43).

(4) The first plaintiff himself was a director of the first defendant company and therefore, deemed to have full access to the books of accounts, audited accounts and all documents of the first defendant company. This claim was also unauthentic as the plaintiffs themselves had exhibited the report and financial statements for the financial year ended 31 December 2016. Even if there were obstacles placed by the defendants to the plaintiffs' access to documents of the first defendant company, such conduct per se and without more, did not amount to oppression or other objectionable conduct to justify relief under s 346 of the Act. The plaintiffs, therefore, had not convinced the court that this alleged act had caused them to have suffered oppression as minority shareholders (see paras 47–50).

(5) The plaintiffs were fully aware that the first defendant company had business dealings with U-Fresh which was incorporated by the second defendant company. The complaint of giving credit terms by the first defendant company to U-fresh was a non-issue since it was part and parcel of its business, and was an internal management issue. The plaintiffs may have disagreed with the managerial decisions made by the defendants but this was not a basis for a finding of minority oppression. Merely establishing that the respondent's breach of fiduciary duty brought about by a transaction involving the assets of the company which had benefited the majority shareholder, would not suffice to enable a petitioner to obtain an order, unless the petitioner could show that it had suffered loss by reason of the transaction. Even if there was any truth in the plaintiffs' complaint, this would amount to a corporate wrong per se which had nothing to do with a minority oppression application (see paras 53, 55 & 58–60).

(6) The plaintiffs' claim that the defendants by not redeeming Lot 703 had breached cl 9.2 of a share sale agreement ('the agreement') entered into between the first and second plaintiffs and the second defendant had nothing to do with a minority oppression action simply because this dispute was not one in the plaintiffs' capacity as shareholders. There was an admission by the first plaintiff that the defendants had not breached cl 9.2 of the agreement. Therefore, these allegations were not bona fide, unfounded and were made with the aim of exerting pressure on the defendants to achieve collateral purpose, namely to force the defendants to redeem the charge created by the first and second plaintiffs over Lot 703 which was charged to the bank by the first and second plaintiffs in 1998 and 2004, which was prior to them selling part of their shares to the second defendant (see paras 65 & 67–69).

(7) Both the PDT share sale agreement and trust deed revealed that the PDT shares were paid for by the first defendant company. There was, therefore, no reason for the first defendant company to pay the sum of MYR750,000 to the first plaintiff. This was nothing but an attempt to recover a disputed sum of MYR750,000 allegedly paid by the first plaintiff for the purchase of PDT shares. The minority oppression application on this ground was again erroneous, as whatever grouses the plaintiffs had were not grouses qua shareholders but were personal disputes (see paras 73 & 75–77).

(8) The plaintiffs' allegations did not amount to oppression against the plaintiffs qua members of the first defendant company, nor do they amount to unfairness or disregard of the plaintiffs' interest as shareholders. The application was merely for the benefit of the first and second plaintiffs, not as shareholders but in their personal capacity. The plaintiffs were not genuine when they complained of the wrongs against

A the first defendant company. The defendants had adduced credible denials of the allegations made by the plaintiffs. The court was sceptical of the bona fides of the plaintiffs in pursuing the application for minority oppression (see paras 78, 82, 85 & 87–88).

B **[Bahasa Malaysia summary**

Permohonan ini berkenaan dakwaan penindasan minoriti seperti yang didokumentasikan dalam saman pemula yang difailkan oleh plaintif di bawah s 346 Akta Syarikat 2016 ('Akta'). Plaintif adalah pemegang saham minoriti syarikat defendan pertama dan plaintif pertama juga merupakan pengarah syarikat defendan pertama. Defendan kedua dan ketiga adalah pemegang saham syarikat defendan pertama, sementara defendan keempat hingga kelapan adalah pengarah syarikat defendan pertama. Defendan keenam dan kelapan juga merupakan pengarah dan pemegang saham syarikat defendan kedua, sementara defendan kesembilan adalah setiausaha syarikat kedua syarikat defendan pertama dan defendan kedua. Tindakan menindas tersebut adalah: (a) kegagalan/keengganan defendan untuk mengeluarkan sijil saham kepada plaintif pertama dan kedua walaupun telah melaburkan sejumlah wang sebanyak RM352,484 ke syarikat defendan pertama; (b) penyalahgunaan kuasa dengan niat jahat dalam mencairkan saham plaintif pertama dan kedua, dengan memberikan 600,000 saham kepada defendan kedua; (c) penolakan hak akses ke buku-buku akaun, akaun yang diaudit dan semua dokumen syarikat defendan pertama, di mana plaintif mendakwa adalah perbuatan yang menindas; (d) pembayaran yang tidak wajar untuk ladang kelapa sawit di mana plaintif mendakwa bahawa sejumlah besar wang telah dibelanjakan untuk mengusahakan kelapa sawit di sebidang tanah ('Lot 6988') yang dimiliki oleh Pertanian Daya Teguh Sdn Bhd ('PDT'), yang merupakan anak syarikat syarikat defendan pertama; (e) urus niaga yang tidak dibenarkan dan menyalahi undang-undang dengan U-Fresh Sdn Bhd ('U-Fresh'), sebuah syarikat yang berkaitan dengan defendan keenam dan kelapan di mana plaintif mendakwa bahawa U-Fresh berhutang dengan syarikat defendan pertama sejumlah wang; (f) kegagalan menebus sebidang tanah ('Lot 703') yang didakwa oleh plaintif pertama dan kedua adalah milik mereka, tetapi telah dicagarkan kepada bank untuk kepentingan syarikat defendan pertama; dan (g) kegagalan defendan membayar plaintif pertama dan kedua sejumlah RM750,000, sebagai bayaran pendahuluan untuk pertimbangan saham dalam PDT, yang mereka tuntut masih terhutang kepada mereka oleh syarikat defendan pertama.

I **Diputuskan**, menolak permohonan dengan kos RM12,000:

(1) Plaintif pertama sendiri telah menolak untuk melanggan saham syarikat defendan pertama, dan bahkan telah bersetuju agar jumlah tersebut diperlakukan sebagai pinjaman olehnya sebagai pengarah, untuk dibayar balik secara ansuran, tanpa faedah, tanpa jaminan, dan tanpa tempoh

pembayaran tetap. Dalam keadaan seperti itu, plaintif tidak adil dan salah tempat untuk sekarang menuntut penindasan minoriti untuk pinjaman yang bersifat peribadi dari plaintif pertama dan kedua kepada syarikat defendan pertama, dan yang mana plaintif pertama dan kedua telah bersetuju untuk dibayar balik melalui ansuran dan tanpa faedah (lihat perenggan 31–32).

(2) Plaintif pertama dimaklumkan bahawa peratusan pegangan sahamnya di syarikat defendan pertama akan dicairkan. Dia bahkan mengakuinya, tetapi enggan melanggan saham baru. Dengan keterangan dokumentari seperti itu, adalah tidak adil dan keliru untuk plaintif menuntut sekarang bahawa pengurangan saham mereka dilakukan dengan niat buruk (lihat perenggan 34 & 36).

(3) Tuntutan plaintif bahawa sejumlah besar wang dibelanjakan untuk mengusahakan kelapa sawit di Lot 6988 yang dimiliki oleh PDT, anak syarikat syarikat defendan pertama adalah keputusan yang diambil oleh syarikat defendan pertama sebagai sebahagian daripada pengurusan dalamannya dan oleh itu, tidak ada penindasan mengenainya. Kedua, plaintif pertama mengetahui penanaman kelapa sawit di Lot 6988. Plaintif, yang mempunyai pengetahuan dan penglibatan sepenuhnya dalam ladang dihalang dari sekarang untuk mendakwa bahawa tingkah laku syarikat defendan pertama itu menindas. Ketiga, walaupun tuntutan plaintif adalah salah urus syarikat defendan pertama, ia tidak memenuhi ambang 'penindasan' yang dikehendaki oleh s 346 Akta kerana mereka tidak menunjukkan rungutan yang dilakukan terhadap mereka sebagai pemegang saham minoriti (lihat perenggan 37–38, 40 & 42–43).

(4) Plaintif pertama sendiri adalah pengarah syarikat defendan pertama dan oleh itu, dianggap mempunyai akses penuh ke buku akaun, akaun yang diaudit dan semua dokumen syarikat defendan pertama. Tuntutan ini juga tidak sah kerana plaintif sendiri telah mengemukakan laporan dan penyata kewangan untuk tahun kewangan yang berakhir pada 31 Disember 2016. Sekalipun ada halangan yang dilakukan oleh pihak defendan terhadap akses plaintif ke dokumen syarikat defendan pertama, perilaku seperti itu sendiri dan tanpa lebih banyak lagi, tidak sama dengan penindasan atau tindakan lain yang membantah untuk membenarkan relif di bawah s 346 Akta. Oleh itu, plaintif tidak meyakinkan mahkamah bahawa tindakan yang didakwa ini telah menyebabkan mereka mengalami penindasan sebagai pemegang saham minoriti (lihat perenggan 47–50).

(5) Plaintif mengetahui sepenuhnya bahawa syarikat defendan pertama mempunyai urusan perniagaan dengan U-Fresh yang diperbadankan oleh syarikat defendan kedua. Aduan pemberian terma kredit oleh syarikat defendan pertama kepada U-fresh bukan masalah kerana ia

merupakan sebahagian daripada perniagaannya, dan merupakan masalah pengurusan dalaman. Plaintif mungkin tidak setuju dengan keputusan pengurusan yang dibuat oleh defendan tetapi ini bukan asas untuk penemuan penindasan minoriti. Hanya membuktikan bahawa pelanggaran kewajiban fidusiari oleh responden yang disebabkan oleh transaksi yang melibatkan aset syarikat yang telah menguntungkan pemegang saham majoriti, tidak akan cukup untuk membolehkan pemohon memperoleh perintah, kecuali jika pemohon dapat menunjukkan bahawa dia telah mengalami kerugian oleh sebab urus niaga. Sekalipun ada kebenaran dalam pengaduan plaintif, ini akan menjadi kesalahan korporat yang tidak ada kaitan dengan permohonan penindasan minoriti (lihat perenggan 53, 55 & 58–60).

(6) Tuntutan plaintif bahawa defendan dengan tidak menebus Lot 703 telah melanggar klausa 9.2 perjanjian jual beli saham ('perjanjian') yang dimeterai antara plaintif pertama dan kedua dan defendan kedua tidak ada kaitan dengan tindakan penindasan minoriti hanya kerana pertikaian ini bukan salah satu pihak yang mempunyai tanggungjawab sebagai pemegang saham. Terdapat pengakuan oleh plaintif pertama bahawa defendan tidak melanggar klausa 9.2 perjanjian tersebut. Oleh itu, tuduhan ini tidak benar, tidak berasas dan dibuat dengan tujuan memberi tekanan kepada defendan untuk mencapai tujuan cagaran, iaitu untuk memaksa defendan menebus pertuduhan yang dibuat oleh plaintif pertama dan kedua atas Lot 703 yang dikenakan kepada bank oleh plaintif pertama dan kedua pada tahun 1998 dan 2004, yang sebelum mereka menjual sebahagian daripada saham mereka kepada defendan kedua (lihat perenggan 65 & 67–69).

(7) Kedua-dua perjanjian penjualan saham PDT dan surat ikatan amanah mendedahkan bahawa saham PDT telah dibayar oleh syarikat defendan pertama. Oleh itu, tidak ada alasan bagi syarikat defendan pertama untuk membayar sejumlah MYR750,000 kepada plaintif pertama. Ini hanyalah usaha untuk mendapatkan sejumlah wang yang dipertikaikan sebanyak MYR750,000 yang didakwa dibayar oleh plaintif pertama untuk pembelian saham PDT. Permohonan penindasan minoriti dengan alasan ini sekali lagi salah, kerana apa sahaja perbalahan plaintif bukan merupakan perbalahan sebagai pemegang saham tetapi merupakan pertikaian peribadi (lihat perenggan 73 & 75–77).

(8) Dakwaan plaintif tidak berjumlah sebagai penindasan terhadap plaintif sebagai ahli syarikat defendan pertama, dan juga tidak berjumlah ketidakadilan atau pengabaian kepentingan plaintif sebagai pemegang saham. Permohonan itu hanya untuk kepentingan plaintif pertama dan kedua, bukan sebagai pemegang saham tetapi atas kemampuan peribadi mereka. Plaintif tidak wajar ketika mereka mengadu kesalahan terhadap syarikat defendan pertama. Defendan telah memberikan penafian yang

boleh dipercayai terhadap tuduhan yang dibuat oleh plaintif. Mahkamah skeptikal terhadap bona fide plaintif dalam meneruskan permohonan penindasan minoriti (lihat perenggan 78, 82, 85 & 87–88).]

Cases referred to

Bellador Silk Ltd, Re [1965] 1 All ER 667, ChD (folld)
Cheah Ngun Ying v Low Cheong & Sons Sdn Bhd & Ors [2010] 9 MLJ 385; [2009] 1 LNS 1498, HC (refd)
Chieng Siew Hui v Promax Road Construction Sdn Bhd & Ors [2008] MLJU 567; [2008] 10 CLJ 86, HC (refd)
Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor [2007] 7 MLJ 618; [2008] 7 CLJ 315, HC (refd)
Elder v Elder & Watson Ltd [1952] SC 49 (refd)
Five Minute Car Wash, Re [1966] 1 All ER 242, ChD (folld)
HR Harmer Ltd, Re [1959] 1 WLR 62, CA (refd)
Ho Yew Kong v Sakae Holdings Ltd [2018] SGCA 33, CA (folld)
Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal [2014] 3 MLJ 10, FC (folld)
Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227, PC (folld)
Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789; [1994] 1 LNS 73, HC (refd)
Ng Chee Keong v Ng Teong Kiat Highlands Plantations Ltd [1980] 1 MLJ 45 (refd)
Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113; [1996] 4 CLJ 716, FC (refd)
Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor [2010] MLJU 269; [2010] 6 CLJ 721, FC (refd)
Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors [2018] 1 MLJ 141, FC (folld)
Rock Nominees Ltd v RCO (Holdings) plc (in liquidation) and others [2004] 1 BCLC 439, CA (refd)
Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324, HL (refd)
Tan Kian Hua v Colour Image Scan Sdn Bhd & Others [2004] MLJU 178; [2004] 6 CLJ 174, HC (distd)
Trivoli Freeholds Ltd, Re [1972] VR 445 (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 181
Companies Act 2016 ss 346, 347, 348
Companies Act [SG] s 216

YK Tee (Hans & Partners) for the plaintiffs.
KS Ong (KS Ong & Co) for the defendants.

Evrol Mariette Peters JC:

THIS APPLICATION

[1] This application concerns an allegation of minority oppression as documented in the originating summons filed by the plaintiffs under s 346 of the Companies Act 2016 ('the Companies Act').

[2] Counsel for the defendants raised a preliminary objection that the filing of this application was incorrect as he claimed that the intitulement, as well as some of the reliefs, reflected a derivative action which should have been initiated under s 347 of the Companies Act 2016.

[3] Based on the documents before me, I dismissed the preliminary objection and took the view that since the application was made under s 346 of the Companies Act, it will be treated as such; and any claim of it being a derivative action would be judged on the actual contents of this application, rather than on its intitulement and reliefs.

[4] However, I eventually dismissed the plaintiffs' application for the following reasons:

THE BACKGROUND FACTS

[5] The plaintiffs are minority shareholders of the first defendant company. The first plaintiff is also a director of the first defendant company.

[6] The second and third defendants are shareholders of the first defendant company, whilst the fourth to eighth defendants are directors of the first defendant company.

[7] The sixth and eighth defendants are also directors and shareholders of the second defendant company, whilst the ninth defendant is the company secretary of both the first defendant and second defendant companies.

THE ALLEGED OPPRESSIVE ACTS

[8] The following are the oppressive acts:

(a) failure/refusal of the defendants to issue share certificates to first and second plaintiffs despite their claim of having injected a sum of MYR352,484 into the first defendant company;

(b) abuse of power in bad faith in diluting the shares of the first and second plaintiffs, by allotting 600,000 shares to the second defendant;

(c) denial of the right of access to the books of accounts, audited accounts and all documents of the first defendant company, wherein the plaintiffs claim amounted to oppressive conduct;

(d) unjustified payment for oil palm plantation where the plaintiffs claim that a substantial amount of money was spent in cultivating oil palm on a piece of land ('Lot 6988') owned by Pertanian Daya Teguh Sdn Bhd ('PDT'), which is a subsidiary of the first defendant company;

(e) unjustified and illegal transactions with U-Fresh Sdn Bhd ('U-Fresh'), a company related to the sixth and eighth defendants wherein the plaintiffs claim that U-Fresh owed the first defendant company a substantial amount of money;

(f) failure to redeem a piece of land ('Lot 703') which the first and second plaintiffs claim belong to them, but is now charged to the bank for the benefit of the first defendant company; and

(g) failure of the defendants to pay the first and second plaintiffs the sum of MYR750,000, being an advance payment for the consideration of shares in PDT, which they claim is still owing to them by the first defendant company.

THE RELIEFS SOUGHT

[9] The following are, inter alia, the reliefs sought by the plaintiffs:

(a) declarations to the effect that the defendants in exercising their powers as majority shareholders, directors, and company secretary, respectively, had acted in a manner that is oppressive and unfairly discriminatory, which had prejudiced the interests of the first defendant company and the plaintiffs as minority shareholders;

(b) that a firm of professional accountants be appointed by the plaintiffs to inspect the accounts and documents of the first defendant company, its subsidiaries and related companies (including PDT), to determine if there have been payments for illegal transactions; and if any such payments have been made, for those (including the defendants) who received or facilitated such payments to repay/re-transfer/reimburse the first defendant company, its subsidiaries and related companies (including PDT);

(c) that Lot 703 be redeemed from the charge and the issue document of title ('IDT') be returned to the first and second plaintiffs;

(d) that the first and second plaintiffs be released from all personal guarantees to the loan taken for the benefit of the first defendant company;

(e) that MYR21,694.38 be returned to the first and second plaintiffs which they claim were balance of the monies advanced for shares which were never allotted;

(f) that MYR750,000 be returned to the first and second plaintiffs which they claim were advanced for purchase of shares in PDT; and

(g) that the second defendant purchase the plaintiffs' shares in the first defendant company; or alternatively for the first defendant company, its subsidiaries and related company, that is PDT, be wound up.

THE LAW

[10] The starting point in addressing this application is s 346 of the Companies Act 2016 which reads:

Section 346 — Remedy in cases of an oppression

(1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

(2) If on such application the Court is of the opinion that either of those grounds is established, the Court may make such order as the Court thinks fit with the view to bringing to an end or remedying the matters complained of, and without prejudice to the generality of subsection (1), the order may —

(a) direct or prohibit any actor cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in the future;

(c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;

(d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or

(e) provide that the company be wound up.

(3) If an order that the company be wound up is made under paragraph (2)(e), the provisions of this Act relating to winding up of a company shall apply as if the order had been made upon a petition duly presented to the Court by the company, with such adaptations as are necessary

(4) If an order under this section makes any alteration in or addition to any constitution, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the constitution inconsistent with the order, but subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days from the making of the order.

(6) The applicant who contravenes subsection (5) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, in the case of a continuing offence, to a further fine of five hundred ringgit for each day during which the offence continues after conviction.

[11] The leading authority on the scope of s 346 of the Companies Act (formerly s 181 of the Companies Act 1965) is the Privy Council case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227. In that case, Lord Wilberforce held that:

> ... for the case to be brought within section 181(1)(a) at all, the complainant must identify and prove 'oppression' or 'disregard'.

[12] There is no universal definition of 'oppression': *Re Trivoli Freeholds Ltd* [1972] VR 445; and *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789; [1994] 1 LNS 73.

[13] However, in simple English, 'oppression' means 'burdensome, harsh and wrongful': *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324.

[14] It refers to conduct towards members of the company or some of them, that lacks the degree of probity which they are entitled to expect in the conduct of the affairs of the company: *Re HR Harmer Ltd* [1959] 1 WLR 62.

[15] The question whether there is oppression or disregard or unfair discrimination, or whether the conduct complained of is 'otherwise prejudicial' is one that must eminently be determined according to the facts of each particular case: *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1

A MLJ 113; [1996] 4 CLJ 716.

[16] 'Disregard' in this context involves something more than a failure to take account of the minority's interest, as there must be awareness of that interest and an evident decision to override it or brush it aside or set at naught
B the proper company procedure: per Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd*.

[17] The underlying theme of a minority oppression application is 'unfairness'. Although the court has very wide discretion, the concept of
C fairness must be applied judicially and contextually, and the interpretation which is given by the court must be based upon rational principles.

[18] An indication of oppression is when there is visible departure from the standards of fair dealing, and a violation of the conditions of fair play which a
D shareholder is entitled to expect: *Elder v Elder & Watson Ltd* [1952] SC 49.

[19] However, the mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that
E power, make policy or executive decisions, with which the plaintiffs do not agree, is insufficient. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section relating to minority oppression can be invoked: *Re Kong Thai Sawmill (Miri)*
F *Sdn Bhd*.

[20] Although a single act or omission on the part of the wrongdoers may constitute oppression that justifies relief; it is only actionable where by its very nature such act or omission has so devastating or far reaching a consequence
G upon the rights of a member: *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113; [1996] 4 CLJ 716.

[21] It is important to bear in mind that in an application for minority shareholders oppression, it must be established that the wrong is a personal
H wrong to the minority shareholder, and not a distinct corporate wrong. This caution was administered by the Federal Court in *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10, where it was held that the reliefs sought in the oppression action must be with a view to remedying the matters complained of; and that it would be an
I abuse of the oppression action where the nature of the complaint was misconduct rather than mismanagement (see also *Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors* [2018] 1 MLJ 141).

[22] On this note I also look to the fairly recent Singapore case of *Ho Yew*

Kong v Sakae Holdings Ltd [2018] SGCA 33 where the Singapore Court of Appeal in interpreting s 216 of the Singapore Companies Act (which in gist is s 346 of the Malaysian Companies Act) provided the following useful principles:

(a) where an act of oppression features both personal wrongs against the shareholder and corporate wrongs against the company, the court needs to consider the real injury that is complained of and the essential remedy that is sought in ascertaining whether a minority oppression claim brought is an abuse of process;

(b) director's breach of his duty of care, skill and diligence in monitoring the management of his company's affairs would amount to oppression only if the negligent mismanagement is sufficiently serious; and

(c) a shareholder who complains of oppression may be precluded from seeking relief under s 346 where it has an alternative remedy that is both appropriate and adequate to bring to an end the matters complained of.

[23] The Singapore Court of Appeal then laid down the following analytical framework to ascertain whether an oppression claim pursued under (s 346), is an abuse of the process:

(a) injury:

(i) what is the real injury that the plaintiffs seek to vindicate? and

(ii) is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) remedy:

(i) what is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiffs have suffered? and

(ii) is it a remedy that can only be obtained under s 346 of the Companies Act?

[24] The Companies Act provides a separate and distinct remedy for corporate wrongs. Since the oppression provision under s 346 can be invoked without the leave of court, and if successfully invoked, can result in the grant of a much broader range of remedies than those available in a statutory derivative action under s 347, the undeniable concern is to ensure that plaintiffs do not improperly pursue an action for minority oppression when a remedy under a statutory derivative action is more apt.

[25] A distinct corporate wrong, therefore, should be remedied by way of a statutory derivative action, found in ss 347 and 348 of the Companies Act,

which read:

Section 347 — *Derivative proceedings*

(1) A complainant may, with the leave of the Court initiate, intervene in or defend a proceeding on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.

Section 348 — *Leave of Court*

(1) An application for leave of the Court under section 347 shall be made to the Court without the need for an appearance to be entered.

(2) The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of Court under section 347.

(3) Where leave has been granted for an application under section 347, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) In deciding whether or not the leave shall be granted, the Court shall take into account whether-

(a) the complainant is acting in good faith; and

(b) it appears prima facie to be in the best interest of the company that the application for leave be granted.

(5) Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave of the Court.

[26] It is also important to note that the personal wrong complained of must be a wrong qua shareholder and not a personal dispute with the company or its majority shareholders or its directors: *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor* [2007] 7 MLJ 618; [2008] 7 CLJ 315.

[27] Premised on the principles above, this court will have to ascertain whether the plaintiffs have established that there is oppression, disregard, unfair discrimination or whether the acts complained of are prejudicial to them: *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor* [2010] MLJU 269; [2010] 6 CLJ 721.

CONTENTIONS AND FINDINGS

Failure/refusal of the defendants to issue share certificates to first and second plaintiffs

[28] Counsel for the plaintiffs submitted that although the first and second plaintiffs had injected a sum of MYR352,484 into the first defendant company, they were not issued shares.

[29] Reference was made to *Chieng Siew Hui v Promax Road Construction Sdn Bhd & Ors* [2008] MLJU 567; [2008] 10 CLJ 86, where a similar petition was allowed by the Court of Appeal on the basis that shares were not registered in favour of the applicant/petitioner.

[30] It must be noted that first, part of that sum has been paid, leaving a balance of MYR21,964.38 which is evidenced by the statement of financial position as at 31 December 2015 and notes to the financial statements as at 31 December 2015 attached as exh NKC6 to the affidavit in reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

[31] Secondly, according to the facts of this case, the first plaintiff himself had declined to subscribe to the shares of the first defendant company, and had even agreed for the sum to be treated as a loan by him as director, to be repaid by instalments, free of interest, unsecured, and with no fixed repayment term.

[32] Under such circumstances, I find it inequitable and misplaced for the plaintiffs to now claim minority oppression for a loan that was personal from the first and second plaintiffs to the first defendant company, and for which the first and second plaintiffs had agreed to be repaid via instalments and interest-free.

Abuse of power in bad faith in reducing the plaintiff's shares

[33] It is undisputed that 600,000 shares had been allotted to the second defendant in December 2013, thus diluting the plaintiffs' shares. In relying on the authority of *Cheah Ngun Ying v Low Cheong & Sons Sdn Bhd & Ors* [2010] 9 MLJ 385; [2009] 1 LNS 1498, the plaintiffs claim this was done in bad faith.

[34] However, based on undisputed documentary evidence, the first plaintiff was informed that the percentage of his shareholding in the first defendant company would be diluted. He even acknowledged it, but refused to subscribe for new shares.

[35] This is evidenced by the *Agenda to Landyork Farming Sdn Bhd Board Of Directors' Meeting* dated 21 June 2011 and the *Minutes of the Directors' Meeting of Landyork Farming Sdn Bhd* dated 8 August 2012, attached as exhs NKC4 and NKC5 respectively to the affidavit in reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

[36] In light of such documentary evidence, it is inequitable and spurious for the plaintiffs to now claim that the reduction of their shares was done in bad faith.

Unjustified payment for oil palm plantation

[37] Plaintiffs claim that a substantial amount of money was spent on cultivating oil palm on Lot 6988 which is owned by PDT, a subsidiary of the first defendant company.

[38] My view is that first, this was a decision taken by the first defendant company as part and parcel of its internal management and therefore, there was nothing oppressive about it.

[39] I am guided by the words of Lord Wilberforce in *Re KongThai Sawmill (Miri) Sdn Bhd v Ling Beng Suang*:

> The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked ...

[40] Secondly, the first plaintiff was aware of the oil palm cultivation on Lot 6988. In fact, he was directly involved in the purchase of PDT which owned Lot 6988 for the purposes of planting oil palm at all material times.

[41] This is evidenced by *Landyork Farming Sdn Bhd Minutes of Directors Meeting* held on 24 January 2007 and 28 May 2007, attached as exh NCK-9 to the affidavit in reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

[42] The plaintiff, having full knowledge and involvement in the plantation is prevented from now claiming that the conduct of the first defendant company is oppressive.

[43] Thirdly, even if the plaintiffs' claim amounts to mismanagement of the first defendant company, it did not meet the threshold of 'oppression' required by s 346 of the Companies Act: *Ng Chee Keong v Ng Teong Kiat Highlands Plantations Ltd* [1980] 1 MLJ 45, as they had not demonstrated the grievance done to them as minority shareholders.

Denial of the right of access to the office book of accounts, audited accounts and other documents

[44] The plaintiffs claim that they had been denied access to the office books, accounts and other documents of the company.

[45] Counsel for the plaintiffs relied on *Tan Kian Hua v Colour Image Scan Sdn Bhd & Others* [2004] MLJU 178; [2004] 6 CLJ 174, to submit that inaccessibility to the office accounts amounted to oppressive conduct which justified the winding up of the first defendant company.

[46] I am unable to agree with this contention. First, in that case the accounts were kept in the defendant's house, and secondly there were other grounds in that case which compounded the basis for the High Court to rule in favour of the plaintiffs in their allegation of minority oppression. Thirdly, the applicant who claimed minority oppression in that case were shareholders only and not directors.

[47] On the facts of the present case, it is to be noted that all material times, the first plaintiff himself was a director of the first defendant company. He was, therefore, deemed to have full access to the books of accounts, audited accounts and all documents of the first defendant company. Reliance on *Tan Kian Hua v Colour Image* is, therefore, misplaced.

[48] It is also my observation that this claim is unauthentic as the plaintiffs themselves had exhibited the report and financial statements for the financial year Ended 31 December 2016 exhibited in the affidavit in support of the plaintiffs dated 31 July 2018, deposed to by Choy Yuk Kong, the first plaintiff.

[49] Even if there were obstacles placed by the defendants to the plaintiffs' access to documents of the first defendant company, in my view such conduct per se and without more, does not amount to oppression or other objectionable conduct to justify relief under s 346 of the Companies Act. It is to be borne in mind that although a single act or omission on the part of the wrongdoers may constitute oppression that justifies relief, it is only actionable where by its very nature such act or omission has so devastating or far reaching a consequence upon the rights of a member: *Owen Sim v Piasau Jaya Sdn Bhd*.

[50] The plaintiffs, therefore, have not convinced the court that this alleged act has caused them to have suffered oppression as minority shareholders.

Unjustified and illegal transactions with U-Fresh which is related to the sixth and eight defendant

[51] The plaintiffs claim that U-Fresh Sdn Bhd, which is a related company to the sixth and eighth defendants, owed the first defendant company an amount of MYR2,963,264 as at 31 December 2016.

[52] The plaintiffs claim that the sixth and eighth defendants have breached their fiduciary duties as directors towards the first defendant company by dealing with U-Fresh without authorisation and in furtherance thereto, have fraudulently and dishonestly gained benefit/ interest for U-Fresh without any justifiable reason.

[53] In my view, this argument is flawed. First, it cannot be denied that the plaintiffs were fully aware that the first defendant company had business dealings with U-Fresh which was incorporated by the second defendant company.

[54] In fact, U-Fresh was one of the purchasers of pigs bred by the first defendant company, and the plaintiffs were fully aware of the fact that U-Fresh purchased the pigs bred by the first defendant company at a reasonable price, and that the first defendant company had benefitted from this association. In addition, U-Fresh relieved the pressure exerted by middlemen who were always attempting to control the price of pigs.

[55] Secondly, the complaint of giving credit terms by the first defendant company to U-fresh is a non-issue since it is part and parcel of its business, and is an internal management issue. There was nothing oppressive about it.

[56] Guidance is obtained from the principles enunciated in *Re Five Minute Car Wash* [1966] 1 All ER 242 at p 246, where it was stated:

> The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well-founded.

[57] It was also stated in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227:

> The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, made policy or executive decisions, with which the complainant did not agree, was not enough.

[58] The plaintiffs may have disagreed with the managerial decisions made by the defendants but this is not a basis for a finding of minority oppression.

[59] Thirdly, it has been held that merely establishing that the respondent's breach of fiduciary duty brought about by a transaction involving the assets of the company which had benefited the majority shareholder, would not suffice to enable a petitioner to obtain an order, unless the petitioner could show that

it had suffered loss by reason of the transaction: *Rock Nominees Ltd v RCO (Holdings) plc (in liquidation) and others* [2004] 1 BCLC 439).

[60] Therefore, even if there was any truth in the plaintiffs' complaint, this would amount to a corporate wrong per se which had nothing to do with a minority oppression application. Bearing in mind the principles enunciated in the case of *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10, *Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors* [2018] 1 MLJ 141 and *Ho Yew Kong v Sakae Holdings Ltd* [2018] SGCA 33, I am of the view that the plaintiffs have not made a case for minority oppression on this ground.

Failure to redeem Lot 703

[61] The plaintiffs claim that a piece of land belonging to the first and second plaintiffs (Lot 703) was charged to the bank for the benefit of the first defendant company, and that the land was agreed to be redeemed; and for the first and second plaintiffs to be released as guarantors but that that was yet to be done. The plaintiffs claim that the defendants had failed to abide by this promise.

[62] The issues regarding the redemption of the land was in actual fact related to a share sale agreement ('the agreement') dated 26 September 2006 entered into between the first and second plaintiffs as the vendors, and the second defendant (Metalkat (M) Sdn Bhd) as the purchaser.

[63] Pursuant to cl 3.6 of the agreement, the first and second plaintiffs had agreed to pay MYR500,000 from the consideration received from the purchaser into the first defendant in return, for new issuance of shares to increase the issued and paid up capital of the first defendant company.

[64] The defendants claimed that this was not done, and as a result it had affected the redemption of Lot 703 as the failure of the first and second plaintiffs to subscribe to the shares had reduced the funds in the first defendant company.

[65] The plaintiffs, on the other hand, claimed that the defendants by not redeeming Lot 703 had breached cl 9.2 of the agreement.

[66] Counsel for the defendants submitted that the redemption was not effected as the first and second plaintiffs had breached cl 3.6 of the agreement dated 26 September 2006 in that they had failed to pay the MYR500,000 each to subscribe shares in the said company.

[67] I am of the view that first, this has nothing to do with a minority oppression action simply because this dispute is not one in the plaintiffs' capacity as shareholders. It is a personal contractual dispute between first and second plaintiffs and the defendants, and it is a misapplication of s 346 of the Companies Act by the plaintiffs to seek relief as minority shareholders when the relief here is for their own personal gain, in particular the first and second plaintiffs.

[68] Secondly, based on the correspondence between the solicitors of the first plaintiff and defendants, there was an admission by the first plaintiff through his solicitors, Messrs GS Tang Azizi and Partners in a letter dated 28 February 2011, that the first plaintiff had agreed that the defendants had not breached cl 9.2 of the agreement, and that the first plaintiff '... will not proceed with their claim against the defendants for the discharge of the property ...'. This letter was exhibited as exh NCK2 to the affidavit in reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

[69] I am, therefore, in agreement with counsel for the defendants that these allegations are not bona fide, unfounded and are made with the aim of exerting pressure on the defendants to achieve collateral purpose, namely to force the defendants to redeem the charge created by the first and second plaintiffs over Lot 703 which was charged to the bank by the first and second plaintiffs in 1998 and 2004, which was prior to them selling part of their shares to the second defendant.

Failure of the defendants to pay MYR750,000 to the first and second plaintiffs being an advance payment for the consideration of shares in PDT

[70] The first and second plaintiffs claimed that an advanced payment of MYR750,000 for the consideration of shares in PDT had been made to the first defendant company, but that the first defendant company had failed to repay such amount.

[71] The background facts were that PDT was purchased by the first defendant company via a share sale agreement dated 9 November 2006 made between Alias bin Ahmad, Amir bin Ali and Yap Keong Wah as the vendors of 100,000 shares in PDT, and Chaw Koon Heng, the first plaintiff and the sixth defendant as purchasers of the shares. Those shares were to be registered in the name of the first plaintiff and the sixth defendant in the amount of 50% each.

[72] A trust deed dated 9 November 2006 was then signed by Chaw Koon Heng, the first plaintiff and the sixth defendant, whereby the first plaintiff and sixth defendant acknowledged that the shares of PDT were to be held by them as trustees for the first defendant company.

[73] Both the PDT share sale agreement and trust deed reveal that the PDT shares were paid for by the first defendant company.

[74] This is evidenced by the share sale agreement and trust deed attached as exhs NKC7 and NKC8 respectively to the affidavit in reply of the defendants dated 23 August 2018, deposed to by the sixth defendant, Ng Kong Chen.

[75] There was, therefore, no reason for the first defendant company to pay the sum of MYR750,000 to the first plaintiff.

[76] It appears, therefore, that this is nothing but an attempt to recover a disputed sum of MYR750,000 allegedly paid by the first plaintiff for the purchase of PDT shares.

[77] The minority oppression application on this ground is again erroneous, as whatever grouses the plaintiffs have are not grouses qua shareholders but are personal disputes.

CONCLUSION

[78] It is my view that the plaintiffs' allegations set out above do not amount to oppression against the plaintiffs qua members of the first defendant company, nor do they amount to unfairness or disregard of the plaintiffs' interest as shareholders.

[79] The reminder in *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor* [2007] 7 MLJ 618; [2008] 7 CLJ 315 is timely at this juncture where it was stated that s 346 relief 'is only applicable to case where the oppressive conduct affects the petitioning member qua member.

[80] It is also important to note that there were no complaints by the plaintiffs that the defendants as directors of the first defendant company had acted in breach of or beyond the memorandum and articles of association.

[81] In fact there were even no claims at all by the third and fourth plaintiffs.

[82] This reinforces my view that this application was merely for the benefit of the first and second plaintiffs, not as shareholders but in their personal capacity.

[83] The claims by the plaintiffs that the defendants had acted against the interests of the first defendant company were also misplaced as they were distinct corporate wrongs which were independent of the plaintiffs' rights as

A minority shareholders. Whatever disputes the plaintiffs had with the first defendant company, its directors or majority shareholders should not be channeled through a minority oppression application, as it was not a grievance in their capacity as shareholders of the said company.

B **[84]** The reminders and caution administered by the courts in *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10, *Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors* [2018] 1 MLJ 141 and *Ho Yew Kong v Sakae Holdings Ltd* [2018] SGCA 33, must be heeded, to prevent the plaintiffs from seeking an order not with the C genuine object of obtaining the relief claimed, but with the predominant object of exerting pressure to achieve a collateral purpose.

[85] Furthermore, it is my view that the plaintiffs were not genuine when D they complained of the wrongs against the first defendant company. I am therefore guided by the case of *Bellador Silk Ltd* [1965] 1 All ER 667 where it was decided that if it is discovered that the applicant is seeking an order to achieve a collateral purpose, the court will dismiss the application as being an abuse of process of the court.

E

[86] I also look to *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789; [1994] 1 LNS 73 where it was stated that at the end of the day, the judge must decide the application on the evidence before it. If allegations are made in affidavits by the plaintiffs and F those allegations are credibly denied by the defendants in affidavits, the judge must ignore the disputed allegations. The judge must then decide the fate of the application based on undisputed facts.

G **[87]** Looking at the facts as they are, I find that the defendants had adduced credible denials of the allegations made by the plaintiffs.

[88] Taking into account the relationship history between the plaintiffs and defendants, and considering the reliefs sought, and the fact that they were H focused solely on benefitting the first and second plaintiffs only, I am sceptical of the bona fides of the plaintiffs in pursuing this application for minority oppression.

I **[89]** For the foregoing reasons, the plaintiffs' application is dismissed with costs in the sum of RM12,000 (subject to the payment of allocatur fees).

Application dismissed with costs of RM12,000.

Reported by Nabilah Syahida Abdullah Salleh